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October 14, 1999

Secretary of the FCC
445 12th Ave SW Rm TW-A325
Washington DC 20554

SUBJECT: WT Docket No. 99-217
CC Docket No. 96-98

Dear Commissioners:

We request permission to file late as our company learned of your commission's interest in states' right-of-way management practices for telecommunications corridors early this week. Also, no other party will be prejudiced because they have sufficient time to reply in the reply round December 13, 1999. We offer these comments on our recent experience in Washington State in the hope that a more equitable and timely process can be developed that will benefit both industry and the State.

Pirelli Jacobson installs submarine power and fiber optic cable systems around the world. We recently completed a project involving the installation of some 260 kilometers of fiber optic cable in the waters of Puget Sound and the Strait of Georgia, connecting Vancouver and Victoria, British Columbia with Seattle, Washington. For those portions of the route in Washington waters, we acquired a term easement from the state Department of Natural Resources.

The easement was for the non-exclusive use of a six-inch seafloor corridor along the cable route. The valuation formula for the ROW was determined by the DNR in 1994. After prolonged negotiations, including our agreement to depart from the DNR's own formula in order to raise the value of the ROW for the State, we concluded what we understood was final agreement on the terms in September 1997. Based on that agreement we executed a lump-sum contract with our client on this project in November 1997, to be completed by year-end 1998.

The DNR shortly thereafter increased the ROW cost yet again (another $60,000) and stipulated that Pirelli Jacobson pay administrative processing costs of some $10,000. Under the DNR threat of rescinding the commitment upon failure to execute it within five days, Pirelli Jacobson signed its letter of commitment in February of 1998 and satisfied all outstanding permit and documentation requirements by April. The final agreed fee was *$359,502* for a term of 30 years.

In July 1998, the regional land manager informed us by telephone that executive management in Olympia had rejected the agreement. Our repeated requests for more information or guidance were answered only with the assurance that the DNR was formulating a new valuation policy of which we would be informed "soon."

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By that point of course, the project was well underway. The cable had been manufactured and shipped, installation vessels mobilized, marine survey completed and route selected. Facing the prospect of contractual liabilities for failure to perform in the required timeframe and unable to lay cable until the ROW had been secured, Pirelli Jacobson was compelled to agree to the arbitrarily and substantially altered terms dictated by the DNR. The new duration was 20 years (a third less than originally agreed) at a cost of $479,336 (a third more than the amount originally agreed), doubling the actual cost of the ROW.

To this day, and in spite of numerous requests for its policy or guidelines regarding valuation of cable rights-of-way, the Department of Natural Resources has failed to produce anything. We are painfully aware of the chilling effect this lack of direction has had on the expansion of data and telecommunications capacity in this region.

I enclose a letter written to the Washington Commissioner of Public Lands (dated August 28, 1998) as further background. Please do not hesitate to contact me for any additional information you might need.

Thank you for your interest.

Sincerely,

Bryan Jacobson
President

enclosure

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August 28, 1998

VIA FAX AND U.S. MAIL

Honorable Jennifer Belcher
Commissioner of Public Lands
PO Box 47001
Olympia, WA 98504-7001

Re: PJI Puget Sound Fiber Optic Cable System-Aquatic Lands Easement

Dear Commissioner Belcher:

Please be advised that we have been engaged to represent Pirelli Jacobson, Inc. ("PJI") in connection with the above matter. PJI is a manufacturer and installer of fiber-optic cable. As you are no doubt aware, PJI filed an application with the Department of Natural Resources ("the Department") for a grant of a right-of-way under Puget Sound to lay such cable. The Department issued a commitment to do so upon agreed terms. PJI acted in good faith reliance upon those terms and the representations of Department officials. Now, just as PJI is prepared to commence work on the project, the Department is demanding that the terms be substantially altered or renegotiated.

PJI stands to lose millions of dollars out of pocket and will be exposed to millions more in damages if these changes in terms are implemented. PJI understands the Department's desire to reassess the historical formula it has used to negotiate over the fair market value of such easements, and would be more than happy to do so in negotiating with the Department over the next phase of its project. In that way the economic viability of the project can be considered, before PJI is at risk. But to do so with a project that has already been negotiated under the historical formula, and after PJI has relied on the Department's use of the formula, with the Department's knowledge, is patently unfair. *See Lincoln Shiloh Associates v. Water District*, 45 Wn.App. 123 (1986). Based on the Department's commitment to the historical formula, PJI has put millions of dollars at risk.

Over the course of almost four years PJI negotiated with the Department over the fair market value and the terms of the easement. At the outset of the negotiations, the Department presented the formula it would use in determining fair market value. The negotiations over the price focused on how to apply that formula. The negotiations culminated in a letter from the Department dated September 19, 1997, setting out the terms under which the Department would issue the easement, including the formula.

Based on the negotiated price and terms, PJI entered into a fixed price, turn-key contract whereby it would manufacture the cable, get it on site, lay the cable beginning no later that October 15, 1998, and finishing no later than December 31, 1998, and then deliver the cable and the easement. The cost of the easement and the term of the easement were key figures in the contract, because if the cost of the easement was too high the project was economically unfeasible and could not be sold.

Almost immediately after PJI entered into the contract to install the cable, the Department decided to change the valuation formula slightly, contravening its own policy prohibiting such an altered formula, and increasing the cost to PJI almost $60,000 to $359,502.11. This additional cost was of some concern for PJI, and the parties negotiated over the terms of the proposed changes. On January 26, 1998, the Department issued a commitment letter, at the increased cost, and with the requirement that PJI pick up additional administrative costs expected to be at least $10,000. On February 12, the Department demanded that PJI sign the commitment within five days, or it would be withdrawn. These changes were significant to PJI, but having made the contractual commitment to its customer, it felt compelled to agree, and on February 17, it did so.

Thereafter PJI proceeded to secure the additional permits and revised work schedule that the Department required. In April Department told PJI that the package was being sent to executive management with their recommendation for approval. PJI was led to believe that such approval was pro forma. Because PJI's contract required cable installation to commence no later than mid-October, PJI also began mobilization for the installation phase of the contract with its customer.

By the end of June, however, PJI had not received the executed easement, and began to be concerned. Upon telephoning the Department, PJI was informed that the easement was not going to be issued and that the Department wanted to reevaluate the formula. The Department also refused the tender of the agreed upon price according to the formula.

The Department's action has left PJI in a very precarious position. PJI acted in good faith, relying on the Department's

representations and commitment. PJI's out-of-pocket costs in preparing to perform its contract are over $9 million, and its potential exposure to damages for non-performance could exceed another $16 million. In order to perform according to its contract, it must begin installation forthwith. If the Department will not reconsider its position that a new formula be applied to a project to which both PJI and the Department had already committed under the old formula, PJI will be forced to take whatever action is available to it to protect its rights.

Very truly yours,

Richard L. Phillips

RLP:wp
cc:Charles Baum
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